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90-1457

Supreme Court, U.S.
FILED
MAR 13 1991
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MARCIA J. LITTLES, M.D.,

PETITIONER,

VS.

AREA HEALTH DEVELOPMENT BD., MOSTELLAR MEDICAL CENTER, JAMES A. HOLLAND, AND TYLER W. PEEK,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

I

Whether a Federal District Court's finding of fact in favor of a defendant in a Title VII case are clearly erroneous as a matter of law, when the defendant's trial testimony upon which the findings are based contradict business records prepared and maintained by the successful defendant.

PARTIES IN THE COURT BELOW

All parties in this matter are set forth in the caption of this case.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

MARCIA J. LITTLES, M.D.,

Petitioner,

VS.

AREA HEALTH DEVELOPMENT BD., MOSTELLAR MEDICAL CENTER, JAMES A. HOLLAND, AND TYLER W. PEEK,

Respondents.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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The Petitioner, Marcia J. Littles, M.D., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Eleventh Circuit entered in this proceeding on November 2, 1990, affirming the judgment of the United States District Court for the Southern District of Alabama. The opinions of the Federal District Court and the Court of Appeals are set out in Appendix A through B respectively, **infra**.

JURISDICTION

The Judgment of the Court of Appeals affirming the District Court's Judgment was entered on November 2, 1990. APP. 1a. The Court of Appeals entered an Order denying a timely Petition for Rehearing on December 13, 1990. APP. 1b. The jurisdiction of this Court is found in 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

This case involves Title VII of the Civil Rights Act of 1964, as codified at 42 U.S.C. Sections 2000e-2(a)(1) and 3(a). Section 2000e-2(a)(1) provides:

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; and Section 2000e-3(a) provides:

(2) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in

an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Proceedings Below

The petitioner, Marcia J. Littles, M.D., brought this action on June 2, 1988, in the United States District Court for the Southern District of Alabama, against her former employer, Area Health Development Board, Mostellar Medical Center, its Board Chairman, Tyler W. Peek, and its Executive Director, James A. Holland, alleging that her rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sections 2000e et seq., and 42 U.S.C. Sections 1981 and 1983, had been violated as a result of the respondents failing to promote her to a medical

director vacancy because of her sex, and a retaliaton discharge for the filing of an EEOC Complaint regarding the non-promotion.

The case was tried by the court without a jury from October 16 to October 17, 1989. At the conclusion of the trial the court ordered each party to submit proposed findings of fact and conclusions of law, and following which, on January 8, 1990, the district court rendered a Judgment for the respondents and against the petitioner, dismissing her claim and denying her any relief. App. 1c- 2c. The court also issued on January 8, 1990, its Findings of Fact and Conclusions of Law. App. 1d - 20d.

Petitioner appealed the dismissal to the United States Court of Appeals for the

Eleventh Circuit, alleging that the Findings of Fact upon which the district court's Judgment is based are clearly erroneous within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure. The court of appeals affirmed the district court's Judgment in an unpublished Opinion. App. 1a.

A timely petition for rehearing was denied by the court of appeals on December 13, 1990. App. 1b.

Statement of Facts

Petitioner is a black female physician licensed to practice as an internist in the State of Alabama. (R2-11-14).

Petitioner's medical education was partially funded by a scholarship from the

National Health Service Corps, and to fulfill her scholarship service obligation upon completion of medical school, she accepted a "private practice assignment" with respondent Medical Center in July of 1988, in Bayou LaBatre, Alabama. (R2-15-16).

The respondent Mostellar Medical Center is a medical treatment facility that receives approximately sixty percent (60%) of its funding from federal sources, and is governed by respondent Area Health Development Board, Inc. (R2-18).

Respondent James A. Holland is the Executive Director for the Mostellar Medical Center, and respondent Tyler W. Peek serves as the Board Chairman of the respondent Area Health Development Board. (R2-416).

Respondent Holland is not a physician, but as Executive Director he is responsible for the day to day operation of the respondent Medical Center. The respondents employ a number of health care practitioner (doctors, nurses, etc.) and one of the physicians serve as medical director, and is responsible for the supervision of the medical staff.

In that a substantial portion of respondent's funding comes from the U.S. Public Health Service, the respondent is required to meet certain minimum operating standards and procedures set forth by the Bureau of Health Care Delivery and Assistance of the Public Health Service.

The Public Health Services has several program "indicators" that it utilizes as funding criteria, and it

expects all clinics to be in compliance with the program indicators by the end of their second full year of operation. (R2-419).

The standard for daily on-site patient encounters per staff physician is a minimum of eighteen (18) at "established" clinics. (R2-68).

Clinics operational for less than two years, and newly established service components of existing clinics are not expected to achieve all program indicators, and are only expected to achieve two-thirds of the standards in the area of on-site daily patient encounters. (R2-68 & 69).

Petitioner entered into an employment contract with the respondents whereby, effective July 18, 1986, she would

practice her medical specialty of internal medicine at the respondents' newly opened satellite clinic in Grand Bay, Alabama. (R2-15 & 16). In operating the newly established Grand Bay Clinic, petitioner was solely responsible for generating a patient clientele. (R2-21 & 22).

In the spring of 1987, the present medical director of the respondent clinic gave notice of his resignation effective July 1, 1987, thereby creating a vacancy for the medical directorship of the respondent medical center.

Petitioner submitted a letter of interest regarding the medical director vacancy, requesting information regarding the position. (R2-47).

During this same time period, the respondents were interviewing applicants

for "staff physician" positions to be filled in July of 1987. One of the physicians interviewed for a staff physician position was Dr. Raymond Broughton who was expected to complete his residency in internal medicine in July of 1987. Dr. Broughton, like the petitioner, was seeking a "private practice assignment" to complete his National Health Scholarship service obligation. (R2-217).

Dr. Broughton was not interviewed for the medical director vacancy, and was not contacted regarding that position until after he had returned home following his interview for a staff physician position with the respondents.

According to the Minutes of respondents' May, 1987 Board Meeting, respondent Holland advised the Board that he and his assistant had reviewed all of the staff physicians in the organization, and he had decided that the incoming physician, Dr. Broughton, would be the recommended physician to fill the medical directorship.

At this same Board Meeting, respondent Holland advised the Board that petitioner had submitted a letter of application for the position, but that she would not be a good choice since she is located in a satellite clinic as opposed to the main medical center, where the present medical director is based.

At its meeting in June of 1987, the respondent Board approved the selection of

Dr. Broughton as the new medical director, and rejected petitioner for the reason stated by respondent Holland during the May Board Meeting.

Several months prior to the June, 1987 decision to hire Dr. Broughton as medical director, respondents had actively sought the approval of the Public Health Service for the recruitment of a family practitioner for the Grand Bay Clinic so as to transfer petitioner to another location, and alleviate the need to base two doctors at Grand Bay, an internist for adult patients, and a pediatrician for children.

This plan was not carried out solely because the board could not obtain the Public Health Service's approval for a family practitioner's position in Grand Bay.

When petitioner received no response to her April 1987 letter of application, she sent a second letter to respondent Holland dated June 3, 1987, again requesting information regarding the official advertisement for the job, effective date of the position, salary and other essential information.

Petitioner received no reply from the respondents regarding either of her letters of interest, and she was never interviewed for the medical directorship vacancy.

On July 15, 1987, petitioner submitted a Charge of Discrimination to the EEOC's Regional Office in Birmingham, Alabama, alleging sexual discrimination in the denial of the requested promotion. At the time petitioner's Charge of

When petitioner received no response to her April 1987 letter of application, she sent a second letter to respondent Holland dated June 3, 1987, again requesting information regarding the official advertisement for the job, effective date of the position, salary and other essential information.

Petitioner received no reply from the respondents regarding either of her letters of interest, and she was never interviewed for the medical directorship vacancy.

On July 15, 1987, petitioner submitted a Charge of Discrimination to the EEOC's Regional Office in Birmingham, Alabama, alleging sexual discrimination in the denial of the requested promotion. At

the time petitioner's Charge of Discrimination was submitted to EEOC, a courtesy copy was sent to the respondent Board Chairman, who read the letter and the Charge of Discrimination to the Board at its July 20, 1987 meeting. During this July meeting, the Board also discussed the fact that petitioner's employment contract contained a provision permitting the at-will termination of her employment.

In March of 1988, petitioner received a notice indicating that she was being terminated by the respondent Board for "low productivity."

During petitioner's tenure with the respondent medical center, the Grand Bay Satellite was never cited by the Atlanta Regional Office as being "out of compliance" in any respect. In fact, the regional office has never registered any

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complaints, or concerns regarding the number of daily patient encounters petitioner experienced at the Grand Bay site.

Prior to petitioner's employment with the respondents, the Mostellar Medical Center had been "cited" by Atlanta for being out of compliance in the number of daily patient encounters, and even though the medical center had actually reached the point of being cited, no physician at the Mostellar Clinic was terminated, suspended, warned, or even disciplined in any manner as a result of the infraction.

The Mostellar Medical Center is larger than the Grand Bay Satellite, and is considered to be an "established" clinic, one that is expected to meet the eighteen (18) per day minimum on-site encounter rate.

REASON FOR GRANTING THE WRIT

IN LITIGATION INVOLVING PUBLIC AGENCIES, BOARDS, AND COMMISSIONS, A FEDERAL DISTRICT COURT'S FINDINGS OF FACT SHOULD NOT BE CONTRARY TO FACTS CONTAINED IN LAWFUL MINUTES OF SUCH PUBLIC BODIES WITHOUT A SHOWING THAT THE MINUTES ARE IN ERROR.

In view of Rule 52(a)'s treatment of findings of fact based on documentary evidence, as reflected in its 1985 amendment, certain documents such as board minutes, that are required by law to be maintained by public boards and commissions, and accuracy attested to by board member approval, should be received by a district court as proven facts in a non-jury trial.

The district court made a finding of fact that:

"Plaintiff's low productivity concerning the number of patient encounters that she had per day is in itself a legitimate non-discriminatory reason for plaintiff's termination and non-promotion. This low productivity not only justified the challenged employment decisions but actually placed defendants in jeopardy of loosing federal funding necessary to maintain the clinic."

Appendix D Page 7d.

The district court made a further finding that:

"Dr. Littles continuously turned patients away who were seeking medical treatment... no other physician with the exception of Dr. Littles employed by the Mostellar Medical Clinic have ever refused to see a patient or turned a patient away."

Appendix D Page 7d-8d.

These two very important findings by the district court were contradicted by the Minutes of the respondent Board and

trial exhibits prepared by the "respondents."

The respondents' Trial Exhibit No. 5, was a graph showing the number of monthly patient encounters for each physician employed from August, 1986 through December, 1988. The graph indicated that of the eight (8) physicians employed during the stated period of time, only two equaled or exceeded the expected daily patient encounter rate of eighteen (18), and only one (1) of those two was based at the main established clinic.

Respondents' Exhibit 5 clearly and unequivocally showed that petitioner was not the only physician that did not see at least eighteen (18) patients per day, and further, at least three (3) of the other physicians were based at the "established"

medical center, where the eighteen (18) per day encounter rate is their expected standard goal. Petitioner's standard goal in the newly opened satellite clinic was only twelve (12) encounters per day.

Respondents' Exhibit 5 also clearly indicated that the pediatrician that was later assigned to the satellite clinic in Grand Bay with petitioner, was not meeting the required daily patient encounter rate for a satellite clinic. But yet, no disciplinary action of any sort was instituted against her. She was averaging one encounter per day more than petitioner.

The district court's findings did not specifically deal with petitioner's claim of sexual discrimination in her non-selection for the medical director vacancy. Aside from a passing statement

that petitioner was considered for the position along with others, and that she was found unacceptable because she was not practicing at the Mostellar Medical Center location, there was no further comment on this issue.

The district court made no findings regarding the relative qualifications for the medical director vacancy of petitioner versus Dr. Broughton, the male who was selected.

Petitioner had been a practicing pharmacist for approximately ten (10) years prior to entering medical school. She was board certified in internal medicine in 1985, and had served as an associate instructor at a medical school in the State of Virginia prior to accepting her public health assignment with the respondents. Petitioner was an

officer in the National Health Service Corps for approximately five (5) years prior to entering medical school as well.

On the other hand, Dr. Broughton had not completed his residency program for internal medicine at the time of his selection as the medical director, he had never supervised anyone other than interns and medical students during the normal course of his residency training, he had never engaged in the practice of medicine outside of an educational setting, and he testified at trial that, other than his selection by the respondents, he was not aware of any physician obtaining a medical directorship with any type of health clinic or hospital, immediately out of a residency program.

There was absolutely no testimony that petitioner's alleged low patient encounter rate had any effect on her non-selection for the medical directorship. The only reason put forth by the respondents at the time of her non-selection, and at trial, was that petitioner was located in the satellite clinic, and the medical director position is located at the main medical center. Further, any comments attributed to Dr. Broughton by the district court's Findings of Fact could not possibly have any application to plaintiff's non-selection as medical director, because until he was selected as medical director, Dr. Broughton was not an employee of the respondents.

As to petitioner's claim of a retaliatory discharge, the district court made a finding of fact that:

> "Plaintiff filed the EEOC Charge on July 27, 1987, yet defendants did not decide to terminate her position until March of 1988, and she was not formerly terminated until May of 1988. Eight months elapsed between the time she filed her EEOC Charge and the time defendants decided to discharge her. This long period of time rebuts any inference of retaliatory discharge."

This finding by the district court, ignores the minutes of the respondents following the July, 1987 board meeting during which petitioner's charge of discrimination was read.

Subsequent to the July, 1987 meeting, respondents sent to the Atlanta Regional Office of the Public Health Service, a letter seeking support for the termination

of petitioner. The letter stated in pertinent part:

> "The attorneys we employ are aware of the eighteen patient encounter standard per day and they feel it is vital to our case that we provide them something in writing that binds the physicians employed to the eighteen encounter per day standard."

The letter went on to state that if Regional Office could provide respondents with some "written guideance" that would indicate that physicians are required to see a minimum of eighteen patients per day "it would be greatly appreciated and certainly provide invaluable support for our case."

Prior to petitioner's termination, there was no "case" exccept for her pending EEOC Charge of Discrimination.

The respondents' letter was seeking

support for petitioner's termination based on the daily patient encounter rate for an established clinic, when the respondents knew that, not only was petitioner not required to have eighteen (18) encounters per day, but also, only one physician at the established clinic was seeing the required number per day. The respondents were asking for written support to take adverse action against the petitioner, when at the same time, the "written guidance" sought could have, and should have been applied to other physicians, particularly those working in the established clinic.

At the Board's December 10, 1987 meeting, the Minutes reflect that respondent Holland was going to "explain to the Board that the purpose of the meeting was to make a decision on Dr.

Littles, but because a response has not been received from the Regional Office, the request and decision on Dr. Littles will be postponed. The Regional Office does not want to commit themselves to the fact that a physician should see forty-two hundred (4,200) encounters per year." (Which works out to eighteen encounters per day).

A quick review of the various physicians employed by the respondents during petitioner's tenure there reveals the following:

(1) Dr. Broughton averaged only fourteen patient encounters per day.

(2) Dr. Altman, the pediatrician in the Grand Bay Satellite with petitioner saw only nine patients per day on average.

(3) Dr. Vanderwood, a family practitioner serving in the established

Mostellar Medical Center averaged less patient encounters per day than the required eighteen.

(4) Dr. Ashbee, a pediatrician in the established Mostellar Clinic where eighteen is the expected standard, averaged only 15.4 patient encounters per day.

(5) Dr. Benjamin, another family practitioner serving in the Mostellar Clinic, saw only twelve patients on average.

Aside from petitioner, no physician was terminated or disciplined in any fashion because of a failure to meet the expected patient encounter rate.

The district also made a finding of fact that petitioner's low patient encounter rate "actually placed defendants in jeopardy of loosing federal funding

necessary to maintain the clinic." (App. D at 7d).

There was absolutely no evidence at all suggesting that the Grand Bay Satellite Clinic was in jeopardy of loosing its funding. In fact the evidence was clear that Atlanta never complained about Grand Bay. It was the respondents who continued to solicit and plead with Atlanta to assist in the termination of petitioner following the filing of her Charge of Discrimination with EEOC.

Many, if not all, of the critical facts of this case are contained in the minutes of the respondent Board that are required by law to be maintained and open for public inspection.

These Board minutes and official correspondence between the respondent agency and other governmental agencies

having supervisory authority over it, certainly contain the best evidence of actions taken by the respondents relating to the termination.

As set out above, on several essential factual determinations, the district court ignored the documentary record before it, and accepted the facts as related by the respondents.

Records that are required by law to be prepared and maintained by an agency, and which are also approved by the members of the governing body of the agency should certainly be accepted as "factually correct" as to what transpired during a particular meeting.

A distinction can be made between that type of documentary evidence that includes depositions, affidavits and stipulations of fact, which may be

prepared with litigation in mind, and documentary evidence of a sort that is maintained in the regular course of an agency's function, and are approved by the members of the governing body, and are opened to public inspection at any point and on any occasion, including litigation.

There is substantially more confidence in relying upon minutes duly taken, reviewed and approved as opposed to an affidavit of an individual expressing a particular view on a topic without any checks and balances.

There is a general rule in the State of Alabama that city boards, commissions and other public agencies that are required by law to maintain minutes of their meetings, "speak through their minutes." Kimbrell v. City of Bessemer, 380 So.2d 838, 839 (Ala. 1980). The

Alabama Supreme Court in Kimbrell held that minutes of such boards are the best evidence of official action taken by the board. Id. at 839.

For a district court to dismiss or ignore official documents of a public body, there must be a showing that the documents are flawed in some manner. Otherwise, public confidence in minutes of public board meetings would be severly shaken, and without such a rule laws requiring minutes and the maintenance of other official documents by public agencies will be meaningless. This conveys the notion that the documents themselves cannot be relied upon at face value.

CONCLUSION

Considering the foregoing, petitioner respectfully requests that a Writ of

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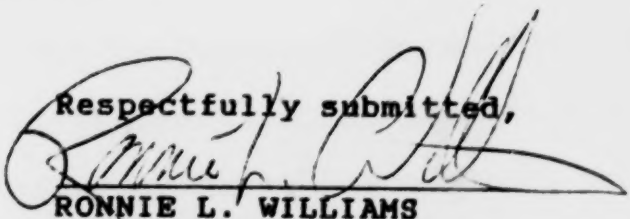
Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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March 13, 1991

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-7099

MARCIA J. LITTLES, M.D.,

Plaintiff-Appellant,

versus

AREA HEALTH DEVELOPMENT BD.,
MOSTELLAR MEDICAL CENTER,
JAMES A. HOLLAND,
TYLER W. PEEK,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

---

ON PETITION(S) FOR REHEARING
(DECEMBER 13, 1990)

BEFORE: TJOFLAT, Chief Judge,

FAY and ANDERSON, Circuit Judges

PER CURIAM:

The petition(s) for rehearing filed by appellant Marcia J. Littles, M.D., is denied.

ENTERED FOR THE COURT:

PETER T. FAY /S/
United States Circuit Judge

APPENDIX "B"

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 90-7099
Non-Argument Calendar

D.C. Docket No. 88-0478-T

MARCIA J. LITTLES, M.D.,

Plaintiff-Appellant.,

versus

AREA HEALTH DEVELOPMENT BD.,
MOSTELLAR MEDICAL CENTER,
JAMES A. HOLLAND,
TYLER W. PEEK,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Alabama

---

(November 2, 1990)

Before TJOFLAT, Chief Judge,

FAY and ANDERSON, Circuit Judges.

PER CURIAM:

The record in this matter fully supports the ruling of the district court. Credibility questions are peculiarly within the province of the fact finder.

The judgement is affirmed.

APPENDIX "C"

THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARCIA J. LITTLES, M.D.	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 88-0478-T
AREA HEALTH DEVELOPMENT BOARD, INC., ET AL.,	)	
Defendants.	)	

JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law filed this date, it is ORDERED, ADJUDGED and DECREED, that plaintiff Marcia J. Littles shall have and recover NOTHING from defendants Area Health Development Board et al., on all claims arising out of this litigation. This claim is dismissed. Costs taxed against the plaintiff.

DONE THIS 8th day of January, 1990.

DANIEL H. THOMAS /S/
SENIOR UNITED STATES DISTRICT JUDGE

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARCIA J. LITTLES, M.D.,	)	
Plaintiff,	)	
vs.	)	CIVIL ACTION NO. 88-0478-T
AREA HEALTH DEVELOPMENT BOARD, INC., ET AL.,	)	
Defendants.	)	

The above styled action was heard before this Court on October 16th, 1989. This Court has fully considered all pertinent materials in the file and hereby makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff, Marcia J. Littles, a black female, is a physician licensed to practice medicine in the state of Alabama.

2. Plaintiff is a National Health Service Corps Scholarship recipient. Plaintiff entered into an employment contract with the Mostellar Medical Clinic in order to fulfill her scholarship service obligation. Plaintiff was employed effective July 18, 1986, at the Grand Bay satellite clinic.

3. The Mostellar Medical Center, is a medical treatment facility organized and operated under the laws of the state of Alabama, and is governed by the Area Health Development Board, Inc.

4. Defendant, James A. Holland, a white male, serves as the Executive Director of the Mostellar Medical Center and is charged with the overall operation and supervision of the Mostellar Center and its satellite clinic in Grand Bay and McIntosh, Alabama. Defendant Holland is responsible for the day to day operation of the Mostellar Center. He is not a physician.

5. Defendant, Tyler Peek was Chairman of the Board of the Area Health Development Board when Dr. Littles was hired and terminated. Mr. Tyler testified that the Chairman position was a non-paying position and that the Area Health Development Board was a non-profit corporation.

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6. The Mostellar Medical Center, through the Area Health Development Board, Inc., is funded in substantial part by the Bureau of Health Care Delivery and Assistance of the U.S. Public Health Services Branch of the Department of Health and Human Services. In that a substantial portion of the funding comes from the U.S. Public Health Service, the Area Health Development Board is required to meet certain minimum operating standards and procedures set forth by the Bureau of Health Care Delivery and Assistance of the U.S. Public Health Service.

7. In March of 1987, Mr. Holland interviewed Dr. Raymond Broughton for a staff physician position at the Mostellar

clinic. Dr. Broughton was expected to complete his residencey in July of 1987, and he was interviewing for the purpose of securing a private practice assignment to complete his National Health Scholarship service organization.

8. In March of 1987, Dr. Allen Shain, medical director, gave notice to Mr. Holland of his resignation effective July 1, 1987, thereby creating a vacancy for the medical directorship of the Mostellar Medical Center.

9. Plaintiff submitted a letter of interest to Mr. Holland in April of 1987, regarding the medical director vacancy, requesting information relative to the requirements for the position.

10. At its meeting of May 18, 1987, the Area Health Development Board was advised by Mr. Holland that Dr. Shain, the present medical director, would be leaving the Mostellar Center in July, and that a new medical director would have to be selected.

11. At the May 1987 Board meeting, Mr. Holland advised the Board that he and his assistant had reviewed all of the staff physicians in the organization and that it had been decided that Dr. Broughton would be the physician recommended to fill the medical directorship. Mr. Holland advised the Board members that plaintiff had submitted a letter of application for the position, but that she would not be a good choice as

she was located at Grand Bay as opposed to Mostellar, where the present director is based.

12. At its meeting in June of 1987, the Area Health Development Board approved the selection of Dr. Broughton as the new medical director.

13. Plaintiff sent a second letter to Mr. Holland dated June 3, 1987, requesting information concerning the official advertisement for the job, effective date of the position, salary, and other essential job information. Plaintiff received no reply to the second letter. Plaintiff became aware that the medical director position had been filled when she received a memo advising all staff members that Dr. Broughton had been selected.

14. Plaintiff submitted a Charge of Discrimination to the EEOC's Regional Office in Birmingham, Alabama, on July 15, 1987, alleging discrimination in the denial of the requested promotion. Plaintiff's attorney sent a copy of the charge of discrimination to Mr. Peek along with a cover letter explaining that defendants were being charged with discrimination.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. Section 1331, 28 U.S.C. Section 1343(3) and 42 U.S.C. Section 2000.

2. Plaintiff's claim is based upon her alleged termination on the basis of sex and race and upon her non-promotion on

the basis of her sex. Plaintiff also asserts a "retaliatory" discharge claim under Title VII. For the reasons outlined below this Court concludes that plaintiff Marcia J. Littles is not entitled to relief under any of her legal theories.

3. This Court must first consider whether Dr. Littles has established a preponderance of the evidence, a prima facie case of sex discrimination. If the Court determines that plaintiff has established a prima facie case, then the burden of proof shifts to defendants to articulate legitimate, non-discriminatory reasons for their actions. (Defendant does not bear the burden of persuading the court that it was actually motivated by the proffered reasons, it is sufficient if defendant's evidence raised genuine issues

of fact as to whether it discriminated against plaintiff). Upon such a showing, the burden shifts back to plaintiff to show that the articulated reasons were a pretext for discrimination and that the true motives were unlawful. The Supreme Court has stated that in employment discrimination suits the ultimate burden of persuading the trier of fact that defendants intentionally discriminated against plaintiff, remains at all times with plaintiff. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed. 2d 207 (1981).

DENIAL OF PROMOTION AND TERMINATION

4. Assuming arguendo that plaintiff established a prima facie case, it is

without question that defendants in this action have met their burden of producing evidence that legitimate, non-discriminatory reasons existed for plaintiff's non-promotion and termination.

5. Dr. Littles testified that she was not considered for the position of medical director in July of 1987, which was later assigned to Dr. Broughton, a black male physician. The evidence clearly indicates that all physicians were considered for the position of medical director prior to Dr. Broughton accepting the position. The minutes of the meeting as shows in defendants exhibit 15 clearly show that all physicians including Dr. Littles were considered for the position of medical director and that both Dr. Bowman of the McIntosh Satellite Clinic

and Dr. Littles of the Grand Bay expansion site were considered but found to be unacceptable because neither doctor would be practicing medicine at the Mostellar Medical Center site where the medical director position was available. In addition Dr. Susan Ashbee, a white female physician, employed and working at the Mostellar Medical Center since 1981, was offered the position of medical director during the selection process but declined to accept the position.

6. Plaintiff's low productivity concerning the number of patient encounters that she had per day is in itself a legitimate non-discriminatory reason for plaintiff's termination and non-promotion. This low productivity now only justified the challenged employment decisions but actually placed defendants

in jeopardy of losing federal fundings necessary to maintain the clinic.

7. The evidence disclosed that Dr. Littles continuously turned patients away who were seeking medical treatment and that these concerns were brought to the attention of Dr. Broughton and Mr. James Holland. Dr. Broughton testified that patients were turned away, appointments were cancelled, patients were asked to leave who were waiting in the office to receive treatment, and that none of the co-employees or the support help desired to work with Dr. Littles. No other physicians with the exception of Dr. Littles employed by the Mostellar Medical Clinic have ever refused to see a patient or turned a patient away. Dr. Broughton testified that he told Dr. Littles if she didn't improve her low patient encounters

that the result could be either the closing of the clinic for lack of funding or her possible termination. He stated that she responded to his concerns by saying, "that's life in the big city." Dr. Broughton testified that after sharing his concerns with Dr. Littles regarding her refusal to see patients, she remained blank and non-responsive. Dr. Broughton said that Dr. Littles was robotic in nature and could not accept criticism of any kind.

8. Dr. Broughton outlined his principal duties and responsibilities and identified defendants exhibit 2 as the job description for the medical directorship. Exhibit 2 clearly shows that one of the qualifications for the medical directorship is that the medical director should be sensitive to the needs of people

from widely diverse cultural backgrounds and must exemplify leadership potentials in the development of a team approach toward establishing a comprehensive health service delivery system.

9. The Court finds that Dr. Littles was definitely not a team player and did not exhibit a team approach toward anything. Dr. Broughton testified that he did not visit the Grand Bay site because of the anger displayed by Dr. Littles when she was being supervised or corrected by her superiors. Dr. Broughton testified that Dr. Littles had a problem everyday; that she was a problem maker and not a problem solver. Dr. Broughton testified that Dr. Littles had low patient encounters and he had warned her on numerous occasions that low patient encounters and/or low productivity at the

Grand Bay site could result in either the clinic being closed or her being terminated. Dr. Broughton concurred with Mr. Holland's recommendation and the Board's decision to terminate Dr. Littles.

10. Plaintiff has not met her burden of showing that the proffered reasons for her termination and non-promotion were a pretext for discrimination and that the true motives were unlawful.

RETALIATORY DISCHARGE

11. Plaintiff also brings a retaliatory discharge claim alleging that she was discharged by defendants solely because she filed a claim with the Equal Opportunity Commission on July 27, 1987. Plaintiff filed the EEOC charge on July 27, 1987, yet defendants did not decide to terminate her position until March of

1988, and she was not formally terminated until May of 1988. Eight months elapsed between the time she filed her EEOC charge and the time defendants decided to discharge her. This long period of time rebuts any inference of retaliatory discharge. Moreover, plaintiff received two significant pay raises between the time she filed her EEOC charge and the time that she was terminated. These pay raises negate any inference that plaintiff was retaliated against for filing the EEOC charge.

12. Filing a complaint with the EEOC does not give an employee the right to fail to perform assigned work nor does it preclude an employer from discharging an employee who fails to do assigned work.

13. Plaintiff has not met her burden of showing that there was a casual

connection between the filing of her EEOC charge and the adverse employment decision against her. Plaintiff will prevail, "... only by proving that but for the protected activity she would not have been subjected to the action of which she claims. If the employee does not bear that burden of persuasion, she may not prevail." Jack v. Texaco Research Center, 743 F.2d 1129, 1131 (5th Cir, 1984).

42 U.S.C. Section 1981

14. Plaintiff also alleges a violation of 42 U.S.C. Section 1981. The United States Supreme Court recently held that 42 U.S.C. Section 1981 only applies to claims involving the making and enforcing of contracts and does not apply to "post formation" conduct. Patterson v.

(1989). In this action the making and enforcing of a contract is not in issue and all issues deal with post employment conduct. Furthermore, Title VII provides the exclusive remedy in discharge claims. Lytle v. Household Manufacturing, 831 F.2d 1057 (4th Cir. 1987). Also section 1981 claims apply only to race discrimination and not to sex discrimination. Runyon v. McCrary, 427 U.S. 160, 167 (1976). Finally, plaintiff must prove intentional discrimination to recover under Section 1981. St. Francis College v. Al-Khazraji, 481 U.S. 604, 613 (1987). Plaintiff has not proved intentional race discrimination and as such her claim under 42 U.S.C. 1981 is denied.

42 U.S.C. SECTION 1983

15. Plaintiff also claims relief

under 42 U.S.C. Section 1983. However, plaintiff has failed to prove a vital element of such a claim, i.e. "state action" or proof that defendants acted under "color of state law." In Mendez v. Belton, 739 F.2d 15 (1st Cir. 1984), the Court held that the action of a highly regulated, private, non-profit entity, was not under "color of state law." The clinic in this action is a highly regulated, private, non-profit entity, and its actions are not under "color of state law."

CONCLUSION

16. Defendants have articulated legitimate non-discriminatory reasons for not promoting plaintiff and for her termination. Plaintiff has not proved discriminatory motive against defendants.

Accordingly, plaintiff's claims for relief are DENIED. In accordance with the above Findings of Fact and Conclusions of Law, a Judgment will be entered forthwith.

DONE this 8th day of January, 1990.

DANIEL H. THOMAS /S/
SENIOR UNITED STATES DISTRICT JUDGE

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(2)

No. 90-1457

In The

Supreme Court of the United States

October Term, 1990

MARCIA J. LITTLES, M.D.,

Petitioner,

vs.

AREA HEALTH DEVELOPMENT BOARD,
MOSTELLAR MEDICAL CENTER,
JAMES A. HOLLAND, and TYLER W. PEEK

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

1. PROCEEDINGS BELOW.

Respondents adopt the petitioner's "Statement Of The Case" as stated on page 4 through 6 in the petitioner's

Petition for Writ of Certiorari and incorporates same into Respondents' Brief in Opposition.

2. STATEMENT OF THE FACTS

Petitioner, Marcia J. Littles' Statement of the Facts mischaracterizes the petitioner's employment history with the Area Health Development Board, the Mostellar Medical Center, its Board Chairman, Tyler W. Peek and its Executive Director, James A. Holland. The petitioner's Statement of Facts is misleading and inaccurate while referring to improper citations to the record. Further, the facts made the basis for the petitioner's alleged reasons for granting the writ are contrary to the Federal District Court's, Finding of Facts and Conclusions of Law which were affirmed by the United States Court of Appeals for the Eleventh Circuit.

a. No Intentional Discrimination Or Retaliation Was Practiced Upon The Petitioner

The petitioner, a National Health Service Corporation scholarship candidate, was employed by the Mostellar Medical Clinic to practice medicine at the new expansion site of the Mostellar Medical Clinic known as the Grand Bay Clinic on or about July 16, 1986. (R2-13-17), (R2-133, 134) The petitioner accepted a "private practice assignment" with the Area Health Development Board to fulfill her commitment to repay the Federal government for funding her medical education and she received a starting salary which was higher than eight of ten other

physicians employed at the Mostellar Medical Center. Of the physicians actively employed when the petitioner was terminated, petitioner was making a salary greater than six of those eight individual physicians. See Respondent's Exhibit 1.

The Respondent, James A. Holland is the Executive Director for the Area Health Development Board responsible for administering medical care at both the Mostellar Medical Center and the Grand Bay expansion site. Respondent Holland testified that in the fall of 1986 he received numerous complaints about Dr. Littles turning patients away on a continuous basis and that he was concerned with her low patient encounters. (R3-422, 423) Dr. Alan Shain, a former Medical Director for the Mostellar Medical Clinic (who resigned in July of 1987) corroborates Respondent Holland's testimony. Dr. Shain testified that he discussed with Petitioner Littles her poor performance and low patient encounters in the fall of 1986 shortly after she was employed. (R3-311) Dr. Shain stated the petitioner's reaction was cold and without much response. (R3-313) Dr. Shain recognized that low patient encounters had to be improved to justify expenditures necessary to maintain the Grand Bay Clinic. (R3-311, 312) Dr. Shain testified the petitioner was slow in patient delivery. In addition, Dr. Shain stated that Dr. Littles could not take criticism; was not a team player; that she was hostile to all employees and that support personnel were fearful of working with Dr. Littles when assigned to the clinic. (R3-315-317) Dr. Shain

testified that all nurses and support personnel who disliked working with Petitioner Littles were very competent personnel. (R3-317) Exhibit 2 entitled "Job Description for Medical Director" lists as a qualification that the applicant "Must be sensitive to the problems and needs of people from widely divergent cultural backgrounds. Must exemplify leadership potentials in the development of a team approach toward establishing a comprehensive health service delivery system."

Dr. Shain discussed with Respondent Holland his concerns regarding Dr. Littles' low patient encounters and the fact that she consistently and intentionally turned away patients on a daily basis. (R3-323, 328, 329) Dr. Shain stated that Atlanta, Georgia [the Federal Funding source] set a standard that each doctor should see about 18 patient encounters, on site, per day. (R3-324) He stated that low patient encounters would result in the closing of the medical clinic. (R3-311-312) Dr. Shain stated that Petitioner Littles was turning patients away as early as October of 1986 from the Grand Bay Clinic. (R3-328, 329) Respondent Holland testified that after many attempts to improve the low patient encounters, he received no cooperation from Petitioner Littles. Dr. Littles testified that within 4 months after she was hired, she requested a $10,000.00 pay raise. (R2-138) While asking for a substantial pay raise with no monies available for said raise, Petitioner Littles notified the Clinic Board that she filed an EEOC complaint against the Area Health Development Board, Inc. During the same period of time she sent a demand to renegotiate her 1987 contract,

requesting a $14,000.00 pay raise. (R2-143) All of these matters had been brought to the attention of the Board and were reflected in the Board Minutes as identified in Respondent's Exhibit 18.

Mr. Holland testified that Dr. Littles continued with low patient encounters until he developed a recommendation for her termination in May of 1988. (R3-440) Respondent Holland testified that Petitioner Littles' poor performance in the area of low patient encounters and her constant refusal to treat patients formed the basis of this recommendation. Mr. Holland adamantly denied that Petitioner Littles was terminated because of race and/or sex and he stated that her poor job performance justified her termination. (R3-437-441) Mr. Holland stated that Petitioner Littles had told her secretaries and receptionists that she did not want to see patients for up to two weeks and that she cancelled patients who had appointments on a daily basis. (R3-439, 440) Respondent Holland warned Dr. Littles in a letter dated November 21, 1986, identified as Respondent's Exhibit 9, that she should strive to see at least 18 patients by the end of the first year at the clinic or federal funding would be adversely affected. Petitioner Littles was required to see at least twelve patients per day, a standard which she never achieved. (R3-420, 421) The Board minutes reflect that Petitioner Littles was seeing only 6 patients per day from August of 1986 through December of 1986. See Respondent's Exhibit 5.

Dr. Raymond Broughton, a black male physician was hired as a Physician-Medical Director at the Mostellar Medical Clinic during July of 1987. (R2-214) Although petitioner contends that she saw more patients than given credit for, Dr. Broughton testified that the patient appointment list, presented by Petitioner Littles as an encounter list during trial, merely indicated the number of appointments in petitioner's appointment book. After examining her appointment list it was determined that it substantially over-represented the number of patient encounters and did not represent patients actually seen. (R2-233, 234) Dr. Broughton stated that Petitioner Littles was definitely not a team player and did not exhibit a team approach to anything. (R3-291, 292) Dr. Broughton stated that Petitioner Littles had a problem everyday; that she was a problem maker and not a problem solver. (R3-290-293) Dr. Broughton testified that Petitioner Littles had low patient encounters and that he warned her on numerous occasions that low patient encounters and/or low productivity at the Grand Bay site could result in either the clinic being closed for lack of funding or her being terminated to which she responded, "that's life in the big city." (R2-223)

Dr. Broughton stated that Petitioner Littles continuously turned patients away who were seeking medical treatment and that these concerns were brought to the attention of he and Mr. James Holland. (R2-222-223) Dr. Broughton stated that many complaints were received from patients about Petitioner Littles. He stated

that patients were turned away, appointments were cancelled, patients were asked to leave who were in the medical office waiting to receive treatment and that none of the co-employees or the support help desired to work with Petitioner Littles. (R2-236, 237, 239, R3-274)

Dr. Broughton testified that no other physicians with the exception of Petitioner Littles employed by the Mostellar Medical Clinic have ever refused to see a patient or turn a patient away. (R3-298-299) Dr. Broughton stated that Dr. Littles was not meeting the standard of patient encounters set by the National Health Service Corporation and that the other physicians were always striving to meet the standards in order to keep federal funding. (R3-299) Dr. Broughton also stated that Dr. Ashbee, a white female was offered the job of Medical Director prior to Dr. Broughton accepting the position. Dr. Broughton said that Dr. Ashbee refused the position because she wasn't interested. (R2-231) Dr. Broughton concurred with Mr. Holland's recommendation and the Board's decision to terminate Petitioner Littles. He stated that Mr. Holland's concerns about Littles' improper patient care were legitimate and that in his opinion she was not terminated because of sex or race. (R2-239, 230) The District Court heard an abundance of evidence from additional witnesses, through documentation and Board minutes concerning the low productivity and improper patient care of Petitioner Littles. The Receptionist, Jackie Poriux who worked with Petitioner Littles from May of 1987 through May of 1988 stated that Petitioner Littles almost everyday rescheduled patients

and cancelled appointments thereby denying proper medical treatment. (R3-336-338) She demonstrated to the Trial Court the manner in which Petitioner Littles would go through her appointment book on a daily basis and instruct the receptionist to cancel patients. (R3-338) Ms. Poriux testified that Petitioner Littles left patients in waiting rooms for over an hour while she typed letters in her office. (R3-339) Ms. Poriux's testimony was uncontradicted and virtually unchallenged by petitioner. (R3-342, 343)

Paula Thompson, a Clerk Receptionist who worked for Petitioner Littles, testified Petitioner Littles instructed her to turn patients away almost everyday. (R3-344-345) Ms. Thompson also demonstrated to the Court how Petitioner Littles would go through her appointment book during the morning and instruct the receptionist to cross out various patients and cancel their appointments. (R3-345) Ms. Poriux saw Dr. Littles turn patients away on a continuous basis who were sick and described this situation as being very embarrassing. (R3-345, 346) The cancellation of patients by Petitioner Littles during January 21 through February 3 corroborated by Ms. Poriux and Ms. Thompson is the subject matter of Dr. Broughton's letter forwarded to Dr. Littles dated January 22, 1988 and identified as Respondent's Exhibit 25. Ms. Thompson stated that Petitioner Littles arbitrarily took patients off the appointment books and cancelled their appointments on a continous basis. (R3-345) Ms. Thompson's testimony was uncontradicted and virtually unchallenged by the petitioner. (R3-348, 349)

The Chairman of the Area Health Development Board, Inc., Mr. Tyler Peek, stated that Petitioner Littles was not terminated because of race or sex. (R3-359, 360) The chairman testified that Petitioner Littles was not denied the Medical Directorship because of sex or race. (R3-357, 358) The chairman testified that patient encounters and low productivity had a direct impact on federal funding. (R3-357) He testified he was extremely concerned with the liability problems Dr. Littles was creating by turning sick patients away. (R3-359, 360)

Mr. Peek testified that Mr. Holland was responsible for the administrative affairs of the Mostellar Medical Clinic and the Area Health Development Board. It was the chairman's understanding that if physicians did not strive to meet the standard number of patient encounters that the clinics would be closed. (R3-353, 354, 362, 387, 398) The chairman, Tyler Peek stated that if Mr. Holland allowed low patient encounters or patients to be turned away, Holland would not be doing his job. (R3-388) Chairman Peek testified that Mr. Holland makes recommendations regarding the employment and termination of all personnel as the Executive Director for the Area Health Development Board. (R3-354)

Chairman Peek testified that all Area Health Development Board meetings are held on a regular basis at which times Mr. Holland attends along with the Board members. Chairman Peek stated that he concurred with Mr. Holland's recommendation that Dr. Broughton be hired as Medical Director. (R3-358) He stated that all

physicians were considered by the Board for the position of Medical Directorship and that the postition had originally been offered to Dr. Susan Ashbee, a female physician prior to being offered to Dr. Broughton. He stated Dr. Ashbee declined the position. (R3-358) He stated that Petitioner Littles was not denied the Medical Director position because of sex. (R3-358) Chairman Peek testified that petitioner Littles received two pay raises subsequent to filing her EEOC complaint and that her contract was renewed subsequent to the filing of the EEOC complaint and that she remained at the same position without loss of any benefits or salary until May of 1988. (R3-387) Chairman Peek concurred with the recommendation of Mr. Holland to terminate Petitioner Littles because of low patient encounters and the refusal to treat patients (R3-360)

Ms. Alphonsine Patterson, Administrative Assistant to the Executive Director of the Mostellar Medical Center, stated that Petitioner Littles was cold and unconscious to individuals and not a team player. (R3-399) Ms. Patterson stated that Petitioner Littles was a problem creator. (R3-399) Ms. Patterson testified that Dr. Broughton met the qualification of exemplifying leadership potential in the development of a team approach towards establishing a comprehensive health service delivery system. (R3-398) Ms. Patterson testified that Dr. Broughton was fully qualified for the Medical Directorship and that he was a kind, considerate person whom the staff fell in love with; all patients adored him. (R3-397, 398) Ms. Patterson testified that Dr. Broughton never refused to see any

patients and the only doctor that she knew that turned away patients during her eight years of employment was Petitioner Littles. (R3-398, 399)

Ms. Patterson testified that Mr. James Holland always strived to administer the affairs of the clinic in the best professional manner. (R3-400) She stated that Mr. Holland does not discriminate racially or sexually towards any employee and that he was of high character and a true professional. (R3-400, 401) She testified that at no time during Dr. Littles appointment did Mr. Holland or any member of the Board display any racial or sexual discrimination towards Dr. Littles or to anyone else employed by the Mostellar Medical Center. (R3-399-401)

The Court's findings were not contradicted by the minutes of the Respondent Board, nor the trial exhibits. The respondents' trial exhibit number 5, clearly demonstrates the problems with the petitioner's low patient encounters. Further, exhibit 11 representing the Board minutes of the Area Health Development Board dated December 19, 1986 accurately reflects the ongoing problems with the petitioner's low patient encounters. In addition, Respondent, Holland notified the petitioner by letter dated November 21, 1986 (See Respondent's Exhibit 9) that her on site encounters during the month of October of 1986 averaged six patients per day which was far from satisfactory.

The record is replete with an abundance of evidence regarding the petitioner's unsatisfactory performance

which is contained in live testimony presented by seven witnesses and through the petitioner's own testimony by way of cross-examnination. In addition, the trial exhibits including Board minutes clearly show an abundance of documentation concerning low patient encounters on the part of the petitioner, the intentional turning away of patients by the petitioner and the refusal of the petitioner to treat patients on a professional basis. Dr. Broughton testified that the petitioner had low patient encounters and that she was warned on numerous occasions about the low patient encounters. (R2-223) Dr. Broughton testified that no other physician refused to treat patients or turned patients away other than the petitioner. (R3-298-299) Dr. Broughton testified the petitioner turned patients away on a regular basis which caused great concern to the Area Health Development Board in regards to liabilitiy and patient care. (R2-222, 223) These concerns were discussed by the Board and reflected in the Board minutes on many occasions. (See Respondents' Exhibit 11, 14, 15, 17, 22 & 24)

Dr. Alan Shain testified that he recognized Petitioner Littles might be terminated because of her personality problems and low patient encounters. (R3-323) Dr. Shain testified he notified Petitioner Littles about her poor performance and low patient encounters in the fall of 1986. (R3-311) Dr. Shain testified that Petitioner Littles was slow in patient delivery. (R3-313)

Without reiterating all of the respondents' witnesses testimony, respondents submit that the chairman of the

Area Health Development Board, Mr. Tyler W. Peek was well aware of the many problems concerning Petitioner Littles prior to the recommendation of her termination. Chairman Peek testified that patient encounters and low productivity had a direct impact on federal funding. (R3-357) Chairman Peek testified that Board meetings are held on a regular basis, that Mr. Holland attends the Board meetings and makes recommendations regarding the employment and termination of all personnel for the Area Health Development Board. (R3-354) Chairman Peek said all physicians were considered for the position of medical directorship by the Board and that the position had been offerd to a female, Dr. Susan Ashbee who declined to accept same. (R3-358) Chairman Peek testified he accepted Mr. Holland's recommendation to terminate Littles because of low patient encounters and the turning away or refusal to treat patients. (R3-360) Chairman Peek testified that Petitioner Littles did not strive to meet the criteria of patient encounters established by the funding authority. (R3-390)

b. The Area Health Development Board, Incorporated is a *Private* Non-Profit Corporation.

Chairman Peek testified that his position was a non-paying position and the Area Health Development Board was a non-profit *private* corporation. (R3-351, 352) The petitioner herself states on page 7 of petitioner's writ that the petitioner accepted a *"private practice assignment"* with the Respondent Medical Center. Further petitioner states on page 11 of her writ that Dr. Broughton, like the

petitioner, was seeking a *"private practice assignment"* to complete his National Health scholarship service obligation. The record reflects that the petitioner and Dr. Broughton accepted a "private practice assignment" at a private non-profit corporation known as the Area Health Development Board, Inc. The petitioner's argument as to why the writ should be granted is fatally flawed. The facts do not support a finding by the District Court that the minutes of a non-profit private corporation must be kept, much less be accurate. In other words, the Area Health Development Board is not a public agency, board or a commission. Even if the petitioner's theory could possibly hold water (that the District Court's findings of fact should not be contrary to facts contained in lawful minutes of *public* bodies without showing that the minutes are in error) such a theory has no relevancy to the Court's findings in this case.

There is no requirement that the Area Health Development Board maintain minutes. As it stands, the minutes submitted to the District Court are not in conflict with the testimony of the witnesses nor the documentary evidence and trial exhibits introduced during the trial of this case. No other physician performed in such an unsatisfactory manner as the petitioner while employed at the Area Health Development Board. The record clearly shows that the respondents were concerned with low patient encounters which could place the respondents in jeopardy of losing federal funding. (R3-425) (R3-357)

Most of the critical facts of this case are contained in the testimony of the witnesses and the trial exhibits which include the minutes of the Respondent Board. These minutes are not required by law to be maintained or open for public inspection. The petitioner has tried to mischaracterize the "Best Evidence" rule when, in fact, the Board minutes do not necessarily contain the "Best Evidence" of actions taken by the respondents relating to the termination of the petitioner. No matter how much the petitioner wishes to take out of context certain statements, either contained or not contained in Board minutes, the Board minutes do not provide better evidence than the other trial exhibits or the testimony of the witnesses offered during the trial of this case.

The petitioner argues the public confidence in minutes of public board meetings would be severely shaken without a rule suggested by the petitioner on page 33 of the petitioner's brief. While not conceding the petitioner's position regarding this theory, the respondent is not a public agency, body, commission or a board. The Board minutes are subject to the same "clearly erroneous" scrutiny as the rest of the trial exhibits and oral testimony presented during the trial of this case before the District Court.

SUMMARY OF THE ARGUMENT

I.

The Sole Legal Argument Made By The Petitioner That The Writ Should Be Granted Is "Inherently Flawed" Because Respondent Is Not A Public Agency Required By Law To Maintain Minutes Of Its Meetings.

The only legal authority cited in the entire brief of the peitioner is an Alabama Supreme Court decision which holds that the City of Bessemer, Alabama, being a public agency was required by law to maintain minutes of their meetings. Furthermore, as stated earlier in this brief, the petitioner herself characterized her appointment at the Mostellar Medical Clinic as a "private practice assignment." Finally, it is important to note that the District Court in this case found no "state action" to support plaintiff's claim under 42 U.S.C. Section 1983, holding that the respondents were private entities not acting under "Color of State Law"

Thus, the petitioner's entire argument is flawed from the very beginning.

II.

The District Court's Findings Are Not Clearly Erroneous.

Apparently, the petitioner argues that documentary evidence such as the minutes of the respondents are not

subject to the "clearly erroneous" standard of appellate review. The petitioner, however, is wrong. Rule 52(a) of the Federal Rules of Civil Procedure was amended on August 1, 1985 to make it perfectly clear that "documentary evidence" is also subject to the "clearly erroneous" rule. Even most "pre-amendment" cases held that the clearly erroneous rule was applicable where there was both documentary and oral testimony involved. Taking, the "entire evidence" in this case into consideration (both oral testimony and documentary evidence), the District Court findings are not clearly erroneous.

REASONS FOR DENYING THE WRIT

I. *The Sole Legal Argument Raised By The Petitioner That The Writ Should Be Granted Is "Inherently Flawed" Because The Respondent Is Not A Public Agency Required By Law To Maintain Minutes Of Its Meetings.*

The petitioner's sole "Reason for Granting the Writ" is stated on page 18 of her Petition, as follows:

> "In litigation involving *public* agencies, boards, and commissions, a Federal District Court's findings of fact should not be contrary to facts contained in lawful minutes of such *public* bodies without a showing that the minutes are in error."

Unfortunately for the petitioner, however, her entire legal argument is "inherently flawed" because respondent is a *private,* non-profit corporation, not a public body. Unlike a public body, the respondent is not required to keep minutes of its meetings. The *only legal authority* cited in the petitioner's entire petition and brief is the Alabama Supreme Court's decision of *Kimbrell v. City of Bessemer,* 380 So.2d 838 (Ala.1980). This case was against the City of Bessemer and, if the case is read carefully, this Honorable Court can see that the legal proposition cited therein is only applicable to public governmental bodies, such as cities or counties. The petitioner has apparently forgotten that she herself characterized her appointment to the Mostellar Medical Center as a *"private practice assignment."* She has also apparently forgotten that the District Court in this case ruled that because the respondents were *private entities,* they did not act under "Color of State Law" to support a claim under 42 U.S.C. Section 1983. (The petitioner did not appeal this portion of the District Court's ruling to the Eleventh Circuit Court of Appeals). See ***Mendez v. Belton,* 739 F.2d 15 (1st Cir. 1984)** (Court holding that extensive government regulation and receipt of federal funds does not transform an otherwise private entity into a governmental actor).

Thus, petitioner's sole legal argument for the granting of the writ is "inherently flawed" from the very beginning and is thus meritless.

II. *The District Court's Findings Are Not Clearly Erroneous.*

Petitioner (rather unusually) herself cites and refers to the August 1, 1985 amendment to Rule 52 of the Federal Rules of Civil Procedure on page 15 of her petition. The respondents, however, fail to understand why the petitioner cites the 1985 amendment to Rule 52 when the amendment clearly favors the *Respondents'* position in this case that the District Court's findings are not clearly erroneous, notwithstanding that part of the evidence introduced at the trial of this case was documentary. As amended Rule 52(a) makes so clear:

> "Findings of fact, *whether based on oral or documentary evidence,* shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In fact, under the present Rule even a case that is tried *solely* or largely on documentary evidence is, nevertheless, subject to the "clearly erroneous" standard. See *Steelmet, Inc. v. Caribe Towing Corporation,* 842 F.2d 1237 (11th Cir. 1988). Of course, in the present case, we are dealing with not only documentary evidence but also oral testimony from many live witnesses who testified at the trial of this case. Even "pre-amendment" cases construing Rule 52 hold that the "clearly erroneous" rule applies when both documentary and oral testimony are

involved. See e.g. *Anderson v. Property Developers, Inc.*, 555 F.2d 648 (8th Cir. 1977). These same "pre-amendment" cases also hold that the reviewing Court can overturn findings of fact only if a review of *"the entire evidence"* leaves the reviewing Court with the definite and firm conviction that a mistake has been committed. See e.g. *Bull's Corner Restaurant, Inc. v. Director of Federal Emergency Management Agency*, 759 F.2d 500 (5th Cir. 1985).

CONCLUSION

For all of the aforesaid reasons, the Writ should not be granted because: (1) the petitioner's sole legal argument is "inherently flawed" (because the respondent is not a *public* entity) and (2) because the District Court's findings are not "clearly erroneous", especially in light of the August 1, 1985 amendment to Rule 52(a).

Respectfully submitted,

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Dated: June 6, 1991